



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 241

[Docket DARS-2015-0050]

RIN 0750-AI74

**Defense Federal Acquisition Regulation Supplement: Contract
Term Limit for Energy Savings Contracts (DFARS Case 2015-D018)**

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense
Federal Acquisition Regulation Supplement (DFARS) to clarify the
contract term for energy savings contracts awarded under 10
U.S.C. 2913.

DATES: Effective [Insert date of publication in the **FEDERAL
REGISTER**].

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, telephone
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SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the Federal Register at 80 FR
72675 on November 20, 2015, to clarify the contract term for
contracts awarded under the statutory authority of 10 U.S.C.

2913. Ten respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments received and the changes made to the rule as a result of those comments follows:

A. Summary of Significant Changes From the Proposed Rule: The final rule has been revised at DFARS 241.103(2) to provide that the contracting officer may enter into an energy savings contract under 10 U.S.C. 2913 for a period not to exceed 25 years. This change to "energy savings contract" from "shared energy savings contract" brings the term limit for all activities authorized by section 2913 under the final rule.

B. Analysis of Public Comments

1. General Support for the Rule

Comment: Several respondents expressed support for the changes in the proposed rule, indicating that the term limit of 25 years would promote the use of shared energy savings contracts, have a positive benefit on small businesses, facilitate greater partnerships between utilities and DoD customers, and increase competition. One respondent indicated that the term limit of 25 years would lead to several benefits including deeper retrofits, elimination of cream skimming,

effectively leveraging private sector funding, and accomplishing the President's Performance Contracting Challenge goals.

Response: Noted.

2. Clarification of the Contract Period

Comment: One respondent requested clarification of the date that the contract period commences. The respondent stated that the rule would most effectively accomplish its goal of accommodating project financing needs if the contract period were tied to the payment term, and suggested that the rule be revised to state the following: "The contracting officer may enter into a shared energy savings contract under 10 U.S.C. 2913 for a 'payment term' not to exceed 25 years."

Response: Payment term is interpreted as the performance period of the contract, which is not to exceed 25 years. The contract period will include the entire performance period, including construction, if any.

3. Inclusion of Water-related Projects

Comment: One respondent expressed concern that the rule's failure to address water-related projects authorized by 10 U.S.C. 2866 would result in ambiguity and confusion with regard to the term limit for such contracts. The respondent suggested that the rule be revised to state the following: "The contracting officer may enter into a contract under 10 U.S.C. 2913 or 10 U.S.C. 2866 for a period not to exceed 25 years."

Response: The recommendation is beyond the scope of the case.

4. Application of 10 U.S.C. 2913 to Agreements with Gas or Electric Utilities

Comment: One respondent stated that 10 U.S.C. 2913 applies not only to shared energy savings contracts, but also to agreements with gas or electric companies, and recommended removing the reference to shared energy savings contracts.

Response: The final rule has been revised at 241.103(2) to provide that the contracting officer may enter into an energy savings contract under 10 U.S.C. 2913 for a period not to exceed 25 years.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not add any new provisions or clauses or impact any existing provisions or clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and

benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This final rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify the contract term for contracts awarded under the statutory authority of 10 U.S.C. 2913. Section 2913 requires DoD to develop a simplified method of contracting for shared energy savings contract services that will accelerate the use of such contracts. DoD is authorized by section 2913 to contract with utility service providers to implement energy conservation measures on military bases. Section 2913 does not indicate a term limit for contracts or activities executed under this authority, and this has created ambiguity and inconsistency throughout DoD on the term limit that is imposed on contracts awarded under the authority. Additionally, the ambiguity has resulted in a hesitation to

enter shared energy savings contracts, contrary to the intent of section 2913.

No comments were received from the public regarding the initial regulatory flexibility analysis.

The rule is not anticipated to have a significant economic impact on small business entities. The number of contract awards made under the authority of 10 U.S.C. 2913 is not currently tracked by DoD's business systems. However, it is estimated that approximately 25 shared energy savings projects are initiated across DoD each year, with approximately 17 being awarded annually. It is believed that most awards are made to large utility providers, with generally 25% or more of the renovation and operations and maintenance work executed under the awards being subcontracted to local small business by the utility provider.

This rule does not create any new reporting or recordkeeping requirements.

There are no known significant alternatives to the rule.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 241

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 241 is amended as follows:

PART 241—ACQUISITION OF UTILITY SERVICES

1. The authority citation for part 241 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Amend section 241.103 by—

- a. Redesignating paragraphs (2) and (3) as paragraphs (3) and (4); and
- b. Adding a new paragraph (2).

The addition reads as follows:

241.103 Statutory and delegated authority.

* * * * *

(2) The contracting officer may enter into an energy savings contract under 10 U.S.C. 2913 for a period not to exceed 25 years.

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[FR Doc. 2016-10824 Filed: 5/9/2016 8:45 am; Publication Date: 5/10/2016]